

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>BLACKWOOD, INC., NOLAN A. PERIN and</b>	<b>:</b>	<b>Civil Action</b>
<b>SCOTT N. PERIN</b>	<b>:</b>	<b>No. 00-3112</b>
	<b>:</b>	
<b>v.</b>	<b>:</b>	
	<b>:</b>	
<b>DAVID A. VENTRESCA and KATHLEEN M.</b>	<b>:</b>	
<b>VENTRESCA</b>	<b>:</b>	
	<b>:</b>	
<b>v.</b>	<b>:</b>	
	<b>:</b>	
<b>LEONARD ZITO, ESQUIRE and ZITO,</b>	<b>:</b>	
<b>MARTINEZ &amp; KARASEK</b>	<b>:</b>	

**Rufe, J.**

**December 19, 2002**

**MEMORANDUM**

Before the Court is the Motion to Dismiss for Lack of Subject Matter Jurisdiction of Defendants David A. Ventresca and Kathleen M. Ventresca. The Ventrescas challenge the allegations in Plaintiffs' Complaint that there is diversity jurisdiction under 28 U.S.C. § 1332.

**I. RELEVANT PROCEDURAL HISTORY**

On June 19, 2000, Plaintiffs Blackwood, Inc., Nolan A. Perin, and Scott N. Perin (hereinafter collectively referred to as "the Blackwood parties" or "Blackwood") commenced this action against Defendants David A. Ventresca and Kathleen M. Ventresca (hereinafter referred to as "the Ventrescas"). Blackwood's Complaint advances claims for breach of fiduciary duties, civil conspiracy, and breach of contract stemming from a business venture relating to the development of a 2100-acre tract of land in Schuylkill County, Pennsylvania. The Complaint bases jurisdiction on diversity under 28 U.S.C. § 1332(a) and alleges: (1) that the Blackwood parties are citizens of the Commonwealth of Pennsylvania; (2) that the Ventrescas are citizens of

New Jersey; and (3) that the amount in controversy exceeds \$75,000.

On July 27, 2000, the Ventrescas filed a Motion to Dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) in which they challenged Blackwood's allegations that they were citizens of New Jersey. The Ventrescas also filed affidavits in which they stated that they voted, paid taxes, and resided in Pennsylvania. On August 24, 2000, the Honorable Franklin S. Van Antwerpen entered an order providing for expedited discovery on the jurisdictional issue. The August 24, 2000 Order also provided that Defendants' Motion to Dismiss was "administratively dismissed without prejudice to the right to Defendants to reassert or re-file said motion or responsive pleading" by November 10, 2000. On December 22, 2000, when the Ventrescas failed to re-file their Motion to Dismiss, Judge Van Antwerpen entered an order directing them to file an answer to the Complaint within fourteen (14) days.

On January 4, 2001, the Ventrescas filed an Answer with Counterclaim. In their Answer, the Ventrescas denied that they were citizens of the State of New Jersey and specifically pleaded lack of subject matter jurisdiction as an affirmative defense. See Defendants' Answer to Plaintiffs' Complaint, ¶¶ 4, 5, and 66. Thereafter, on January 16, 2001, the Ventrescas filed a Third-Party Complaint in which they impleaded Third-Party Defendants Leonard Zito, Esquire and the law firm of Zito, Martino and Karasek (hereinafter collectively referred to as "the Zito parties"). The Third-Party Complaint seeks indemnity and/or contribution and alleges that the Ventrescas "are entitled to recover from Leonard Zito, Esquire, and Zito, Martino and Karasek all or part of any monies that Plaintiffs may recover from them. . . ." Third-Party Complaint at ¶ 5.

In early 2002, after discovery was complete, Judge Van Antwerpen denied case

dispositive motions filed on behalf of each of the parties. On June 14, 2002, in accordance with the Eastern District's procedure for the random reassignment of cases, the above-captioned matter was reassigned to this judge. At a status conference on July 23, 2002, counsel for the Ventrescas suggested that the Court lacked subject matter jurisdiction, asserting that the issue of jurisdiction had never been resolved by Judge Van Antwerpen. Over the objection of counsel for Blackwood, and after reviewing the record, the Court determined that the issue had not been decided on the merits. By Order dated July 23, 2002, this Court granted the Ventrescas leave to re-file their Motion to Dismiss for Lack of Subject Matter Jurisdiction.

On August 5, 2002, the Ventrescas re-filed their Motion to Dismiss, again alleging that they were citizens of Pennsylvania and seeking dismissal based upon lack of subject matter jurisdiction. In support of their Motion, the Ventrescas attached copies of their Schuylkill County voting records, their Pennsylvania resident income tax returns, their New Jersey non-resident income tax returns, Pennsylvania motor vehicle registration and insurance cards, bank records and other documentary evidence. On August 12, 2002, the Blackwood parties responded to Defendants' Motion to Dismiss, asserting that, while the Ventrescas may unlawfully vote and register their vehicles in Pennsylvania, they are nevertheless domiciled in New Jersey. The Blackwood parties submitted voluminous documentary evidence in support of their claim, including telephone bills, bank records, and real estate deeds. On August 16, 2002, the Court entered an order granting Blackwood's request to conduct expedited discovery on the issue of jurisdiction.

Upon review of the record submitted by the parties, this Court determined that factual questions regarding the Ventrescas' citizenship required an evidentiary hearing, which was held

on September 19, 20, and October 28, 2002. The parties stipulated to the admissibility of nearly 300 exhibits and presented the testimony of 12 witnesses. At the outset of the hearing, Blackwood asserted that the jurisdictional challenge had been waived by the Ventrescas' failure to comply with Judge Van Antwerpen's August 24, 2000 Order (which directed the re-filing of the Motion to Dismiss) and that, in any event, the Ventrescas were estopped from litigating the issue of jurisdiction due to their filing a Third-Party Complaint, which the Blackwood parties asserted was based upon diversity jurisdiction.

## **II. PRELIMINARY MOTIONS**

### **A. The Ventrescas did not waive their right to challenge the Court's subject matter jurisdiction.**

The Court first addresses Blackwood's claim that the Ventrescas waived their right to challenge the Court's subject matter jurisdiction when they failed to re-file their Motion to Dismiss in violation of Judge Van Antwerpen's August 24, 2000 Order. The parties do not dispute that the Motion to Dismiss was not re-filed in a timely manner.<sup>1</sup>

Fed. R. Civ. P. 12(h)(3) provides that "[w]henver it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." It is well settled that the defense of lack of jurisdiction over the subject matter is

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<sup>1</sup> When Judge Van Antwerpen entered his December 22, 2000 Order directing the Ventrescas to answer the Plaintiffs' Complaint, he also docketed correspondence from counsel for the parties. By letter dated December 13, 2000, Blackwood's counsel sought to compel the Ventrescas to file a responsive pleading due to their failure to comply with the August 24, 2000 Order. See Doc. No. 12. The Ventrescas' attorney responded that the reason for the noncompliance with the Order was that discovery was ongoing as the result of inaction upon the part of Blackwood's counsel. See Doc. No. 13.

Regardless of the fact that discovery was ongoing, the Ventrescas should have complied with the August 24, 2000 Order, and this Court emphasizes its dissatisfaction with their failure to do so. However, a finding of waiver to a jurisdictional challenge is a sanction that is not permitted. See Rubin v. Buckman, 727 F.2d 71, 72 (3d Cir. 1984) (noting that "jurisdiction cannot be created by estoppel, even as a sanction" for improper conduct).

expressly preserved against waiver. In re Univ. Med. Ctr., 973 F.2d 1065, 1085 (3d Cir. 1992); In re Sch. Asbestos Litig., 921 F.2d 1310, 1316 (3d Cir. 1990). Subject matter is a constitutional and statutory requirement that cannot be created by estoppel or consent. See Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1992); see also Mennen Co. v. Atlantic Mut. Ins. Co., 147 F.3d 287, 293-94 (3d Cir. 1998); Rubin v. Buckman, 727 F.2d 71, 72 (3d Cir. 1984). It is always within the province of the court, and indeed is its duty, to dismiss an action at any time if subject matter jurisdiction does not affirmatively appear of record. Ins. Corp. of Ireland, 456 U.S. at 702.

In this case, the Ventrescas never admitted any jurisdictional facts and they specifically raised lack of subject matter jurisdiction as a basis for dismissal in their Motion to Dismiss and as an affirmative defense in their Answer. The jurisdictional challenge, however, was not decided by the Court. Because a challenge based upon subject matter cannot be waived, this Court finds that the Ventrescas' failure to re-file their Motion to Dismiss in November of 2000 did not constitute an act capable of conferring jurisdiction in this forum. Accordingly, the Court rejects Blackwood's argument that the Ventrescas waived their right to challenge the Court's subject matter jurisdiction.

**B. The filing of a Third-Party Complaint seeking indemnity and contribution from third parties who are Pennsylvania citizens does not warrant a finding that the Ventrescas are judicially estopped from lodging a challenge to jurisdiction.**

The Court next addresses Blackwood's claim that the Ventrescas are judicially estopped from challenging the subject matter of the Court as a result of their third-party claims against the Zito parties, citizens of Pennsylvania. Blackwood contends that the third-party claims are based

upon diversity and that the Ventrescas implicitly pleaded in their Third-Party Complaint that they were domiciliaries of New Jersey.

Initially, it should be noted that the Third-Party Complaint incorporates the pleadings in Defendants' Answer, which specifically avers that there is no diversity between the Blackwood parties and the Ventrescas. As a result of the Ventrescas' express pleading of lack of diversity, this Court is at a loss as to comprehend how the filing of the Third-Party Complaint could constitute a waiver of the jurisdictional challenge, especially in light of the Third Circuit precedent on this issue. See, e.g., Rubin, 727 F.2d at 72 (holding that plaintiff who pleaded diversity jurisdiction in complaint was not bound by his original jurisdictional allegation and could subsequently challenge subject matter jurisdiction of the court, even after entry of judgment in favor of defendant). Moreover, the Third-Party Complaint filed by the Ventrescas is couched in terms of an indemnity or contribution claim against the Zito parties.<sup>2</sup> There is no jurisdictional requirement that a defendant/third-party plaintiff advancing claims for indemnity and contribution stemming from the same transaction or occurrence be diverse with a third-party defendant. See Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978).

Blackwood cites Guaranteed Sys. v. Am. Nat'l Can Co., 842 F. Supp. 855 (M.D.N.C. 1994) in support of their position that federal courts sitting in diversity may not exercise

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<sup>2</sup> The Third-Party Complaint pleads that the Ventrescas are "entitled to recover from Leonard Zito, Esquire and Karasek all or part of any monies that the Plaintiffs may recover from them." Third-Party Complaint, at 1-2. The prayer for relief seeks "judgment against Third-Party Defendants . . . for all sums that may be adjudged against [Defendants] in favor of Plaintiffs. . . ." Id. at 2. It should be noted that the Zito parties previously filed a Motion to Dismiss in which they asserted that the Ventrescas' third-party claims should be dismissed because said claims were not related to Blackwood's direct claims against the Ventrescas. See Third-Party Defendants' Motion to Dismiss, Doc. No. 17. On March 13, 2001, Third-Party Defendants' Motion was denied without prejudice. See Order dated March 13, 2001, Doc. No. 24. It is unnecessary for this Court to revisit that issue.

supplemental jurisdiction over claims against third parties if doing so would be inconsistent with the jurisdictional requirements of Section 1332. Blackwood misconstrues the Guaranteed Systems holding, which is predicated upon the Supreme Court’s directive in Owen Equipment. Guaranteed Systems stands for the principal that a *plaintiff* may not evade the jurisdictional requirements of Section 1332 “by naming initially only those defendants whose joinder satisfies Section 1332’s requirements and later adding claims not within original federal jurisdiction against other defendants . . . who have been joined on a supplemental basis.” 842 F. Supp. at 857. While it is true that the Blackwood parties would have been prohibited from advancing any direct claims against the Zito parties—even after the third-party claims were brought by the Ventrescas—due to the lack of diversity between the Blackwood parties and the Zito parties, the same does not hold true for the Ventrescas’ contribution and indemnity claims. In accordance with the supplemental jurisdiction statute, 28 U.S.C. § 1367, the Ventrescas are permitted to advance indemnity and contribution claims—regardless of diversity—provided that said claims arise out of the same transaction or occurrence as Blackwood’s underlying lawsuit.

Because the Ventrescas have consistently averred in their pleadings that they are citizens of Pennsylvania, even if independent subject matter jurisdiction were required for the third-party indemnity and contribution claims advanced in the Third-Party Complaint, the appropriate remedy would be dismissal of the third-party claims for lack of subject matter jurisdiction, not a finding that the Ventrescas are estopped from challenging the Court’s jurisdiction over Blackwood’s claims. Accordingly, the Court also rejects Blackwood’s contention that the Ventrescas are estopped from challenging the Court’s subject matter jurisdiction and instead will consider the Motion to Dismiss on the merits.

### **III. JURISDICTIONAL CHALLENGE**

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) may advance either a facial or factual challenge to subject matter jurisdiction. Fin. Software Sys. v. First Union Nat'l Bank, 84 F. Supp. 2d 594, 596 (E.D. Pa. 1999) (citing Mortensen v. First Fed. Sav. and Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)). Where a motion to dismiss creates a factual issue regarding subject matter jurisdiction, there is no presumption of truthfulness to the jurisdictional allegations in the Complaint. Mortensen, 549 F.2d at 891. In assessing a Rule 12(b)(1) motion, the parties may submit and the court may consider affidavits and other relevant evidence outside the pleadings. Berardi v. Swanson Mem'l Lodge No. 48 of Fraternal Order of Police, 920 F.2d 198, 200 (3d Cir. 1990). When a defendant supports its attack on jurisdiction with supporting affidavits, the plaintiff has the burden of responding to the facts so stated. Int'l Assoc. of Machinists & Aerospace Workers v. Northwest Airlines, 673 F.2d 700, 711 (3d Cir. 1982).

As set forth above, the Court permitted discovery on the jurisdictional issue. Because the affidavits and documentary evidence contained in the record submitted by the parties revealed disputed issues of fact, the Court held an evidentiary hearing. The Court sets forth below its Findings of Fact, Discussion and Conclusions of Law in consideration of the evidence presented at the three-day hearing:

### **IV. FINDINGS OF FACT**

1. David Ventresca was born in Pottsville, Schuylkill County, Pennsylvania and resided there until the age of fifteen, when he moved to Hackettstown, New Jersey to live with his aunt. He graduated from high school in New Jersey and then attended college in Minnesota. Upon



completion of college, he moved to Florham Park, New Jersey, where he worked and lived until 1973.

2. Kathleen Ventresca was born on Long Island, New York and thereafter moved to Parsippany, New Jersey, where she graduated from high school. She possessed a New Jersey driver's license and regularly voted in New Jersey until 1973.

3. David Ventresca and Kathleen Ventresca were married in 1973 and relocated to Pottsville, Pennsylvania, immediately after their honeymoon. They had three children, all of whom were born in Pottsville, Pennsylvania.

4. Upon returning to Pottsville, Pennsylvania, David Ventresca began working for his uncle's sanitation business in Schuylkill County, Pennsylvania and thereafter formed his own sanitation company, also in Schuylkill County.

5. From 1973 to 1976, the Ventrescas resided at 408 West Market Street, Pottsville, Pennsylvania.

6. From 1977 to 1986, the Ventrescas resided at 1967 Howard Avenue, Pottsville, Pennsylvania.

7. From 1987 to 1992, the Ventrescas resided at 1900 Howard Avenue, Pottsville, Pennsylvania.

8. By 1990, the Ventrescas completed construction of a home at 2611 Mahantongo Street, Pottsville, Pennsylvania. David Ventresca's parents lived in this home until 1992, when David's father died. David Ventresca's mother continues to reside at 2611 Mahantongo Street, Pottsville, Pennsylvania. See Exhibit P-4.

9. The Ventrescas' three children were educated in the Pottsville Area School District through 1992. In 1992, two of their children were diagnosed with learning disabilities.

10. The Pottsville Area School District was not able to provide adequate educational opportunities to learning-disabled students so the Ventrescas investigated schools in Pennsylvania and New Jersey that specialized in the education of learning-disabled students.

11. The Ventrescas were referred to the Hun School in Princeton, New Jersey, a preparatory school that offered a program for learning-disabled students. In 1992, the Ventrescas decided to enroll all three of their children in the Hun School.

12. To avoid boarding their children at the Hun School, the Ventrescas purchased a home at 68 Farrand Road, Princeton, New Jersey, where Kathleen Ventresca and the three children resided while David Ventresca worked and resided in Pottsville, Pennsylvania. See Exhibit P-5.

13. David Ventresca resided at 1900 Howard Avenue, Pottsville, Pennsylvania, on a Monday-through-Friday basis, but regularly visited Kathleen Ventresca and the children at Princeton, New Jersey during the weekends.

14. In 1993, after David Ventresca's father passed away, the Ventrescas sold the 1900 Howard Avenue property. Thereafter, David Ventresca moved into the 2611 Mahantongo Street, Pottsville, Pennsylvania, where he resided with his widowed mother. David Ventresca continues to reside at the 2611 Mahantongo Street, Pottsville, Pennsylvania on Mondays through Fridays.

15. The Ventrescas intended that this living arrangement would be temporary until their youngest child graduated from the Hun School in 1999, at which time both David Ventresca and Kathleen Ventresca would resume full-time residency in Pennsylvania.

16. In 1995, one of the Ventrescas' children died in an automobile accident. This tragedy and another fatal accident involving close friends of the Ventresca children in 1998 traumatized the entire Ventresca family. As a result thereof, the Ventrescas decided that Kathleen Ventresca would remain in New Jersey until their children completed college so that she could be closer to the children.

17. In June of 1999, after their youngest child graduated from the Hun School, the Ventrescas sold the 68 Farrand Street, Princeton, New Jersey property and Kathleen Ventresca moved into an apartment at 2 Chestnut Street, Princeton, New Jersey. Kathleen Ventresca resided at the 2 Chestnut Street address until June of 2000, when this action was commenced.

18. David Ventresca has been involved in numerous commercial development projects in Schuylkill County, Pennsylvania, including Seiders Hill (a large-scale residential/commercial development) and Luther Ridge (a 90-bed personal care center). David Ventresca also owns a commercial garage on Atlantic Avenue in Pottsville, Pennsylvania, which he leases to Waste Management Company, and actively manages the services provided to the tenants of that building. He continues to spend four to five days a week in Pennsylvania in pursuit of his numerous Pennsylvania business interests.

19. David Ventresca has always considered Pennsylvania to be his permanent home. He has been a registered voter in the County of Schuylkill, Commonwealth of Pennsylvania, voting in every election from 1976 through the present, except for 1978. Kathleen Ventresca has been a registered voter in the County of Schuylkill, Commonwealth of Pennsylvania, voting from 1980 through the present.

20. David Ventresca and Kathleen Ventresca have their vehicles registered and insured in Pennsylvania. See Exhibits D-13, D-14, D-15, D-19, D-20, D-21, D-22, D-23, and D-24. The address on David Ventresca's driver's license is 2611 Mahantongo Street, Pottsville, Pennsylvania.

21. For the past fifteen (15) years, David Ventresca and Kathleen Ventresca have listed Pottsville, Pennsylvania as their permanent residence in each of their federal, state and local tax returns. See Exhibits D-6, D-7, D-8, D-9, D-10, D-11, and D-12.

22. In 1999, the Ventrescas sold their Princeton, New Jersey home and derived a capital gain of \$260,000. Because the Ventrescas' "tax home" was in Pottsville, Pennsylvania, they jointly filed a non-resident tax return in New Jersey. See Exhibit D-30. Since the Princeton home was not their primary residence, the Ventrescas paid more than \$50,000 in capital gains taxes.

23. Since 1973, the Ventrescas have continuously maintained health insurance through Pennsylvania Blue Cross and Blue Shield.

24. The Ventrescas are summoned to jury service in Pennsylvania.

25. The Ventrescas own residential and commercial real estate in both Pennsylvania and New Jersey, including a three-bedroom home located at 2611 Mahantongo Street, Pottsville, Pennsylvania and a vacation house located at 14 Starboard Road, North Beach, New Jersey.

26. The Ventrescas' Princeton, New Jersey addresses were designated on mortgage notes and deeds relating to the purchase/sale of the various New Jersey properties; however, said documents and instruments were prepared by persons other than the Ventrescas. See Exhibits P-

2, P-20, P-21, P-30, P-31, P-47, P-52, P-69, P-165, and P-166.

27. Bills, such as for electricity and telephone services, related to living expenses in the Ventrescas' New Jersey homes bear the Ventrescas' names and New Jersey addresses. See Exhibits P-22, P-23, P-72, P-73, and P-74.

28. Social acquaintances and business colleagues regularly see David Ventresca in Pottsville, Pennsylvania on weekdays and occasionally on weekends. David Ventresca maintains active memberships in several Pennsylvania fraternal and social organizations. David Ventresca's active business interests presently require him to spend between three (3) and five (5) days per week in Pennsylvania.

29. The Ventrescas have also maintained a social and civic itinerary in New Jersey, particularly with the Hun School where David Ventresca served on the Board of Directors.

30. Both David Ventresca and Kathleen Ventresca list Pottsville, Pennsylvania, as their domicile in their respective wills, dated December 29, 1998.

## **V. DISCUSSION**

The Blackwood parties allege federal jurisdiction based on diversity of citizenship pursuant to 28 U.S.C. § 1332, which permits a district court to hear state causes of action provided that all plaintiffs are citizens of states other than that in which the defendants are citizens, and the amount in controversy is in excess of \$75,000.00, exclusive of interest and costs. See 28 U.S.C. § 1332(a). When determining whether diversity exists, a court must examine the citizenship of the parties at the time the complaint was filed. Midlantic Nat. Bank v. Hansen, 48 F.3d 693, 696 (3d Cir. 1995) (citing Smith v. Sperling, 354 U.S. 91, 93 n.1 (1957)).

Since the Complaint in this action was filed on June 19, 2000, it is necessary to consider the citizenship of the Blackwood parties and the Ventrescas as of that date.

For complete diversity of citizenship jurisdiction to exist, no plaintiff can be a citizen of the same state as any of the defendants. See Mennen Co. v. Atlantic Mut. Ins. Co., 147 F.3d 287, 290 (3d Cir. 1998). There is a presumption against the existence of federal jurisdiction, and the party invoking the federal court's jurisdiction bears the burden of proof. See Basso v. Utah Power and Light Co., 495 F.2d 906, 909 (10th Cir. 1974). A plaintiff bears the burden of proving that diversity of citizenship exists and ordinarily must prove diversity of citizenship by a preponderance of the evidence. See Krasnov v. Dinan, 465 F.2d 1298, 1301 (3d Cir. 1972).

Citizenship, for diversity purposes, is synonymous with domicile. Id. at 1300. A state is one's domicile if one resides in the state and intends to remain there indefinitely. Id. at 1300-01. In determining domicile, a court may consider a variety of factors, including: (1) voting registration and voting practice; (2) location of personal and real property; (3) the residence claimed for tax purposes; (4) place of employment or business; (5) driver's license and automobile registration; and (6) payment of taxes. See 13B Charles Alan Wright et al., Federal Practice and Procedure: Jurisdiction, § 3612 at 530-31 (2d ed. 1984). A testator's language in a will clearly stating that he is a citizen of a particular state also may be considered in determining one's domicile. See In re: Estate of Theodore J. Getz, Deceased, Appeal of Elizabeth Rygalski, 611 A.2d 778, 781-82 (Pa. Commw. Ct. 1992).

One's domicile continues until a new domicile is acquired or until the original domicile is clearly abandoned. See Cory v. Prot, 85 F.3d 244, 250 (5th Cir. 1996). In order for a change in citizenship to occur, "the person whose citizenship is at issue must reside in the new domicile

and have no fixed and definite intent to return and make [his] home where [he was] formerly domiciled.” Liakakos v. Cigna Corp., 704 F. Supp. 583, 586 (E.D. Pa. 1988). There is a presumption in favor of the old domicile, Lange v. Penn Mut. Life Ins. Co., 843 F.2d 1175, 1179 (9th Cir. 1988), and the party asserting a change in domicile must do so by clear and convincing evidence. Avins v. Hannum, 497 F. Supp. 930, 936 (E.D. Pa. 1980); Herzog v. Herzog, 333 F. Supp. 477, 478 (W.D. Pa. 1971).

In the case at bar, the Blackwood parties bear the burden of showing that the Ventrescas were citizens of New Jersey in June of 2000. To do so, the Blackwood parties must prove by clear and convincing evidence that both David Ventresca and Kathleen Ventresca (1) resided in New Jersey in June of 2000 and (2) that they intended to remain there indefinitely.

The Blackwood parties contend that the voluminous documentary evidence they presented demonstrates that David Ventresca resided in New Jersey. They also urge the Court to find the Ventrescas’ testimony regarding their intention incredible because of claims in affidavits, dated July 26, 2000, in which the Ventrescas stated that they were never “residents” of New Jersey. See Defendants’ Motion to Dismiss for Lack of Subject Matter Jurisdiction, Exhibits 1 and 2, Doc. No. 2. While the statements regarding New Jersey residency may be inaccurate—especially with respect to Kathleen Ventresca—the Court construes the averments in the affidavits to be more in the nature of claims that the Ventrescas were not “citizens” or “domiciliaries” of New Jersey at any relevant time. Although technically incorrect, it is not uncommon for the terms *domicile* and *residence* to be used interchangeably. See Exhibit P-184

at 5.<sup>3</sup> While the Court agrees with Blackwood that the statements in the affidavits were technically inaccurate in the context of this diversity dispute, it gives this line of attack on the Ventrescas' credibility due weight. Moreover, even if the Blackwood parties established that David Ventresca periodically resided in New Jersey, residence alone would not establish that he was a citizen of that state. See Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 48 (1989) (noting that one can reside in one place but be domiciled in another).<sup>4</sup>

Based upon the record in this case, including the Ventrescas' voting history, tax returns, drivers' licenses, and automobile registrations, as well as the testimony of the numerous witnesses who appeared at the evidentiary hearing, this Court concludes that at the time the Complaint was filed David Ventresca was a citizen of the Commonwealth of Pennsylvania. Because the Court finds that both David Ventresca and the Blackwood parties were citizens of Pennsylvania at the relevant time, complete diversity does not exist.

## **VI. CONCLUSIONS OF LAW**

1. Plaintiffs Blackwood, Inc., Nolan A. Perin, and Scott N. Perin were citizens of the Commonwealth of Pennsylvania on June 19, 2000.

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<sup>3</sup> As one court stated:

[T]he terms "residence" and "domicile" have similar meanings. They are frequently used interchangeably because they usually refer to the same place. "Domicile," however, means living in a locality with the intent to make it a fixed and permanent home, [citation omitted], while "residence" simply requires bodily presence as an inhabitant in a given place.

Wolinsky v. Bradford Nat'l Bank, 34 B.R. 702, 704 (D. Vt. 1983).

<sup>4</sup> While the law presumes that a married man's domicile is where his wife and family reside, see Messick v. Southern Pennsylvania Bus Co., 59 F. Supp. 799 (E.D. Pa. 1945), David Ventresca has rebutted this presumption in this case. Based upon all of the circumstances in the case at bar, David Ventresca clearly established that he has resided in Pennsylvania since 1973, that he did not abandon his Pennsylvania domicile, and that he intends to remain indefinitely in Pennsylvania. Although David Ventresca admittedly has ties with New Jersey, Blackwood failed to prove that New Jersey is where David Ventresca was domiciled in June of 2000.



2. Defendant David Ventresca was a citizen of the Commonwealth of Pennsylvania on June 19, 2000.

3. The Blackwood parties failed to prove by clear and convincing evidence that David Ventresca abandoned his Pennsylvania domicile or that David Ventresca had the intention to remain indefinitely in New Jersey, where David Ventresca admittedly visited on a regular basis.

4. Complete diversity of citizenship between all of the plaintiffs and all of the defendants in this case does not exist.

5. Accordingly, the Court lacks subject matter jurisdiction over this case and, therefore, dismisses Plaintiffs' Complaint.

6. Having determined that there is no basis for federal jurisdiction over the Blackwood parties' claims, the Third-Party Complaint, supplemental to Blackwood's claims against the Ventrescas, is also dismissed.

An appropriate Order follows.

<b>BLACKWOOD, INC., NOLAN A. PERIN and</b>	:	<b>Civil Action</b>
<b>SCOTT N. PERIN</b>	:	<b>No. 00-3112</b>
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<b>LEONARD ZITO, ESQUIRE and ZITO,</b>	:	
<b>MARTINEZ &amp; KARASEK</b>	:	

AND NOW, this \_\_\_\_ day of December, 2002, upon consideration of the Motion to Dismiss for Lack of Subject Matter Jurisdiction of Defendants David A. Ventresca and Kathleen M. Ventresca [Doc. No. 63], and the responses thereto, including the memoranda of law submitted by the parties, after an evidentiary hearing thereon and upon consideration of the stipulated record, it is hereby ORDERED that the Motion to Dismiss is GRANTED. Plaintiffs' Complaint is hereby DISMISSED.<sup>5</sup> It is further ORDERED that the Third-Party Complaint of David A. Ventresca and Kathleen M. Ventresca is DISMISSED. Any and all other pending motions are hereby DISMISSED WITHOUT PREJUDICE.

**CYNTHIA M. RUFÉ, J.**

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